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May 16, 2006

AGENDA ITEM 11

TO: MEMBERS OF THE BENEFITS AND PROGRAM ADMINISTRATION COMMITTEE

- I. SUBJECT:** Board Member Elections Process
- II. PROGRAM:** Administration
- III. RECOMMENDATIONS:** Various (See Attachment A)
- IV. ANALYSIS:**

After the 2005 Board Election cycle, members of the Board requested that staff research the feasibility and desirability of making certain changes to the Board Election process. The various proposals would require a mixture of procedural, statutory, and regulatory changes. The Operations Support Services Division (OSSD) researched the implications of each of the proposals as outlined below.

Background

The recently completed 2005 Member-At-Large (MAL) Board election was the first election fully conducted and completed under the amended regulations approved in 2001. The 2005 MAL election schedule was significantly changed from previous schedules as a result of the addition of the following new election activities: a 100-word candidate statement addendum; a candidate statement arbitration process for candidates to resolve controversies related to the statements; and a change from plurality vote to majority vote to determine a winner in a Board election.

The election schedule changes necessary to accommodate these additional activities are as follows: the Notice of Election is distributed January 30, instead of April 1; there is an additional eleven weeks to accommodate the 100-word candidate statement addendum and candidate statement arbitration process; the initial election period is reduced from eight weeks to six weeks; a ten week period is added from the completion of the initial election to the completion of a

runoff election, if one is necessary (the actual voting period in the runoff election is four weeks). Board elections must be completed in time to seat a new Board member by the statutory deadline of January 16 of the following year.

Since this was the first election fully conducted under the amended election regulations, the Board has raised many questions concerning the process. This agenda item addresses those questions and provides recommendations where appropriate.

SUGGESTED CHANGES:

A. Suggestions requiring only administrative or procedural changes:

1. Is it possible to increase the font size or to eliminate any written information on the ballot?

The font size is partially determined by the number of candidates on the ballot. The ballot card has pre-set positions so that up to 26 candidates could be listed on the card. In the case of a small number of candidates, two pre-set positions are used for each candidate, which allows for larger font size on the ballot card. Any non-required voter instruction language could be eliminated.

Unless otherwise directed by the Board, the Board Elections Office will work with the ballot contractor to eliminate any non-essential wording on the ballot card in upcoming elections.

COST: None

2. Is there another system that will allow the use of alternative types of ink, as opposed to "black only?"

The Opto-mark optically scanned ballot card used in CalPERS board elections is certified and approved by the Secretary of State to be used in California elections. This ballot was first approved by the Board to be used in CalPERS board elections in the 2002 elections. This ballot replaces the now disapproved punch card type ballot. Black ink has the most pigment and can always be read by the optical scanning ballot counters. Dark blue ink and #2-pencil can also be read, however, there are shades of blue and pencil that may not be read. During the ballot processing activities, staff sets aside all ballots that are not voted in black or dark blue ink, regardless of ink color and method of voting, and if voter

intent can be clearly determined by Board Elections Staff, the ballot is counted. These ballots are processed by hand, with Office of Audit Services' (OFAS) oversight.

Unless otherwise directed by the Board, the ballot card instructions will be changed to read "black or dark blue" ink.

COST: None

3. How can confidence in the ballot distribution system be improved?

Although the Board Elections Office works to continuously improve the elections process, there is no evidence to support that the ballot distribution system is in need of significant improvement. This is supported by the annual review of the elections process by the Office of Audit Services (OFAS). Mailing reports verify the number of pieces mailed by the contractor matches the mailing information provided by CalPERS. CalPERS did not have address information for approximately 2,400 members, of the total 1.2 million members eligible to vote in the 2005 Member-at-Large election. Ballot packages for these members were mailed to employers for distribution. In 2005, only 63 requests were made to the Board Elections Office for replacement ballot packages for the 2005 MAL initial election and runoff election. In addition, only four members were added to the voter rolls that were not included in the initial ballot mailings.

No proposed recommendations or actions.

COST: None

4. How can CalPERS increase voter participation?

In an attempt to increase voter participation in the 1998 Public Agency, State and School elections, the Board authorized the mailing of postcards to active members reminding them to vote in the upcoming board elections. Pay stub messages, and election reminders were sent with the 1998 Annual Member Statement. In addition, work site election posters were developed by the Public Affairs Office (PAOF) and sent to employers for posting. The average voter return for the 1998 elections was 18.40%, compared to the same elections in 1994 of 23.86%. The average voter return for the same elections in 2002 (excluding the School election because there was only one candidate) was 17.25%. Part of the

justification to elect Board members by majority vote, rather than plurality vote, was to increase voter participation. In the 2005 Member-At-Large election, the vote in the initial election was 16.67% and the runoff election 17.08%. Current methods used to notify members of elections include direct mailings to employers and retirees, the CalPERS website, CalPERS member and employer publications, and outreaches to interested employee and retired organizations.

Unless otherwise directed by the Board, OSSD will work with the PAOF to consider election promotional activities, after reviewing the results of the 2006 CalPERS member surveys which solicit members' input concerning their voter participation in CalPERS Board elections.

COST: Undetermined at this time depending on proposed promotional activities that may be developed after assessing the members' survey input.

5. Should various changes be made to the candidate nomination form and/or procedures?

California Code of Regulations, title 2, section 554.3, regulates the nomination of candidates, and states that the petition shall clearly identify the specific Board member position for which the candidate seeks election. To the end that changes help the nomination form meet this requirement, these changes are permissible and would be consistent with current regulatory requirements. Other changes suggested below would all be permissible under section 554.3, and are primarily procedural considerations.

The Board asked the following three questions concerning the candidate Nomination Petition (CalPERS-BRD-74) form:

- a) Can margins on the nomination form be changed to allow signatories to see the name of the person they are "nominating"?
- b) Can the name and or purpose of the nomination form be included on each page?
- c) Can there be a clearer separation between individuals signing the nomination form?

Unless otherwise directed by the Board, the Board Elections Office will address these three candidate Nomination Petition (CalPERS-BRD-74) form issues for the next election.

- d) Is there an alternate method for verifying system membership, for purposes of candidate endorsement, than using the last six digits of the individual's Social Security number?

Currently, only a partial social security number is used for purposes of verifying membership. The usage of six digits, in place of the full nine digit social security number, began in the 2001 Member-At-Large election.

The present method using member's first and last name and six digits of the SSN provides the best opportunity to validate CalPERS membership without breaching the confidentiality of the member's identity. Anything less than six digits will result in the greater possibility of not validating CalPERS membership. For instance, during the last round of nomination petitions, an average of 364 names were submitted by the candidates. By using name and six digits of SSN, an average of 304 signatures were verified. Using fewer SSN digits reduces the number of signatures that will qualify, e.g., using three digits in this sample validates only 200 signatures of the required 250, too few to qualify.

Using name and date of birth, instead of digits of SSN in this sample, validated 278 signatures. In the 1999 Retired Election the option of date of birth was allowed in place of the full nine-digit SSN. The date of birth can be more reliable, in place of SSN, only when the member's name is provided exactly as it appears on the CalPERS member database, along with accurate employer information. Any variations in these criteria, which don't match the CalPERS member database, will increase the possibility of invalidating the endorsement of a legitimate CalPERS member.

RECOMMENDATION (A-5d): The Board should continue to use last name and six digits of the SSN for purposes of validation of CalPERS membership.

COST: None

B. Suggestions requiring statutory or regulatory change:

1. Should the Board provide candidates an opportunity to submit a new candidate statement for a runoff election?

California Code of Regulations, title 2, section 554.4, currently provides timelines for the submission of candidate statements, addendums to those statements, and the candidate statement arbitration process. The changing of these timelines, while requiring regulatory amendments, is primarily an administrative or procedural issue.

At the time of the development of the amended regulation concerning candidate statements, consideration was given to the submission of a new candidate statement for a runoff election. However, with the addition of new election activities, including a 100-word candidate statement addendum, candidate statement arbitration process (60 days), and a runoff election in a non-majority vote election, there is no time to schedule an additional candidate statement process for a runoff election, since it would need to be subject to the same arbitration process. All of the election activities, including two elections, must be incorporated into the election schedule in time to seat a new Board member by the statutory deadline of January 16 of the following year.

Starting the election process earlier to accommodate the time for a runoff candidate statement process would result in the initial election being held in July, when many School employees are on summer break. Adding the necessary time after the initial election for the runoff candidate statement process would result in the runoff election activities concluding after the January 16 statutory deadline.

RECOMMENDATION (B-1): Maintain current candidate statement process.

COST: None

2. Can candidate statements be censored in either of the following circumstances: a) should CalPERS require that candidate statements be affirmative statements about the candidate and b) should CalPERS require the candidate statement be limited to the scope of CalPERS' jurisdiction?

California Code of Regulations, title 2, section 554.4, subdivision (a) provides some parameters for candidate statements, including that they must be truthful, contain no obscene, vulgar, profane, libelous or defamatory matter, and not contain any remarks that are inherently misleading, including rhetorical remarks and questions that are inherently misleading.

The content and review of candidate statements was the subject of board election regulation changes beginning in 1999. As a result of input from stakeholders, the Board, through regulation changes, decided to add a 100-word addendum to the original 200-word candidate statement; remove the review of the candidate statement by CalPERS staff, and add a candidate statement arbitration process to resolve content issues between the candidates involved in the election. These changes were made to the candidate statement process in order to dispel any perception of partiality by CalPERS. The statements must still meet the provisions of 554.4(a).

The present regulations afford candidates more flexibility in designing their statements to voters. Candidates now have a greater opportunity to express their opinions and inform voters of their positions on issues. In the Candidate Statement booklet the following disclaimer is stated: "The following statements have been prepared by the candidates running for the [] representative position on the CalPERS Board of Administration. **The CalPERS Board of Administration has not verified these statements in their entirety and assumes no responsibility as to their accuracy**".

The California Supreme Court has held restrictions on candidate statements that require a candidate to limit his or her comments to name, age, occupation and a brief description of the candidate's education and qualifications in public elections do not violate the First Amendment of the U.S. Constitution where the restrictions on such statements are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. Courts interpreting the California Elections Code have held that allowing candidates to state their "qualifications" does not permit them to comment on an *opponent's* qualifications; however, "qualifications" do encompass a candidate's ideas or views, ideology and platform. If a court applied public election precedent to CalPERS' elections requirements, it might be expected to uphold laws or regulations that restrict statements to a candidate's own qualifications, but might not uphold restrictions that preclude a candidate from expressing views the candidate believes are part of his or her qualifications, regardless of whether the statement addresses issues within CalPERS' jurisdiction.

California Code of Regulations, title 2, section 554.4 does not currently prevent a candidate from making statements against an opponent, as it allows for a "general statement" and does not limit candidates to a description of "education and qualifications."

RECOMMENDATION (B-2): CalPERS should not place additional limitations on candidate statements beyond those already articulated by California Code of Regulations, section 554.4(a).

COST: None

3. Should CalPERS remove the requirement that a member's signature be placed on the outside of the ballot envelope as a condition of its being accepted as a valid vote?

Government Code section 20096 states the Board may require all persons who perform election duties to certify, under penalty of perjury, that they properly perform those duties. California Code of Regulations, title 2, section 554.5, subdivision (a), referencing section 20096, requires that the member sign the reverse of the ballot envelope, certifying the voter is eligible to vote in the election. By this regulation, the Board has interpreted "election duties" to include the act of voting. If the Board determines it no longer wants to require the voter's signature on the ballot envelope, regulatory change will be necessary.

As a practical consideration, the requirement that the ballot envelope be signed by the voter helps to increase voter confidence in the system and the external perception that standard election practices are being followed. The member signature on the envelope is required in order to "certify under penalty of perjury that the member was an active or retired member of CalPERS on the date of voter eligibility and the member personally voted the enclosed ballot and sealed it in the envelope". The board election procedures do not allow anyone else to sign the ballot envelope for the member; however, any hand written mark attempted as a signature is accepted as a signature. The ballot envelope signature requirement is consistent with California's election processes. Secretary of State elections procedures require the signature of the voter on absentee ballot envelopes. The number of members who don't sign the envelope is negligible in all elections. In the 2005 Member-at-Large initial election only 325 did not sign the envelope, and in the runoff election only 383 did not sign. This is from a total eligible voting population of 1.2 million and 200,000 ballots voted in each election.

RECOMMENDATION (B-3): Do not eliminate the requirement for the member's signature on the outside of the ballot envelope.

COST: None

4. Should the Board allow multiple ballots to be sent in a single envelope?

California Code of Regulations, title 2, section 554.5, subdivision (a) provides there must be a single ballot, marked by a single voter, in each envelope: "Marked ballots shall be returned . . . in the postage paid return envelope . . . and the reverse side shall be signed by *the* voter certifying under penalty of perjury that *the* voter is eligible to vote in the election; otherwise *the* ballot shall not be valid." (Italics added.) A regulatory amendment would likely be required in order to allow multiple ballots in a single envelope.

As a practical matter, the Board should consider what advantage would be gained by allowing multiple ballots in a single envelope. CalPERS provides a postage paid return envelope with the ballot. If more than one ballot is allowed to be mailed in an envelope the principle of one member, one vote can not be properly validated. There is no way to provide adequate accountability, which could lead to fraud, if more than one ballot is allowed in an envelope. The CalPERS Office of Audit Services (OFAS) has determined one ballot per envelope serves as an internal control mechanism to monitor that each member is allowed only one vote per election.

RECOMMENDATION (B-4): Do not allow multiple ballots to be mailed in a single envelope.

COST: None

5. Should the Board consider allowing candidates to request a recount at the conclusion of a non-majority vote winner initial election, rather than waiting until the conclusion of the runoff election?

California Code of Regulations, title 2, section 554.8, subdivision (b) provides timelines for recounts of elections and runoff elections. While the language of this section does not specifically prohibit a recount between an initial election and a runoff election, the regulation would need to be amended to clarify the right to request a recount after a non-majority vote winner initial election, and prior to a runoff election.

The decision of whether to allow the recount of an election that has triggered a runoff is primarily a procedural and administrative one. Under the present board election regulations, the recount process would add 31 days to the schedule after the completion of the initial election. Since the final determination of the runoff candidates would not be known for these additional 31 days, the random drawing for the runoff election order of

candidate names would be delayed for that period. The printing of the ballots and the candidate statement booklet could not take place until the final candidates are determined. After the random drawing, five weeks are needed for the production and mailing of the ballot packages. Under the present election schedule, the incorporation of the recount after the initial election would result in the runoff election ending January 12, 2007, which is just days ahead of the January 16 statutory deadline for seating of the new board member. The same election scheduling concerns surround the addition of a recount of a non-majority vote winner initial election, as surround the addition of new candidate statements for a runoff election.

RECOMMENDATION (B-5): Do not allow a recount of an election in a non-majority vote winner initial election until after the conclusion of the runoff election. A recount of the initial election can always be requested after the conclusion of the runoff election (the election), through the election protest process.

COST: None

6. Should the Board consider revising the policy that requires a runoff election between the top two candidates when one candidate fails to receive 50% plus one of votes cast?

California Code of Regulations, title 2, section 554.6, subdivision (c), added by CalPERS in November 2000, provides for a runoff election if no candidate for any position receives a majority of votes cast, 50% plus one vote, in the initial election. This regulation would need to be changed if the Board decides to revise the policy.

The reasons voiced in support of the October 2000 move to majority selection included:

- Without majority vote, there is a possibility that a candidate could be elected by a small percentage of the vote. For instance, a board member winning with twenty percent of the votes cast means that the candidate is elected by only four percent of the potential voters electing the candidate.
- Key state elections are held by majority vote (through the use of a primary election).
- The runoff election would increase voter interest and participation.

The reasons October 2000 BPAC members cited opposing majority selection included:

- Overtaxing the level of interest of CalPERS members.
- Additional cost to administer a runoff election.
- Concern over shortening the voting period from 61 days to 33 days.

In retrospect, some of the objectives were realized, as were some of the concerns, including:

- There was a slight, 3,000 votes, increase between the initial election and the runoff election in the 2005 Member-At-Large election.
- The cost of the runoff election was \$854,000. The Member-At-Large election is the largest election, with 1.2 million members, and the most costly. The State election has only 274,000 eligible members to vote, which is only 23% of the Member-At-Large election.
- There were a reduced number of members who voted in the 2005 Member-At-Large election as compared with the 2001 Member-At-Large election. This reduction may or may not be attributed to the shortened voting period.

RECOMMENDATION (B-6): The recommendation is included in the analysis whether CalPERS should move to an Instant Runoff Voting method.

7. Should the Board consider voting mechanisms, such as “instant runoff voting mechanisms”, including ranked voting methods and approval voting methods?

The use of any voting mechanism would require regulatory change, as California Code of Regulations section 554.6(a) currently provides for a runoff election between the two candidates who received the highest number of votes.

At this time, there do not appear to be any court cases that address the validity of instant runoff or ranked voting systems.

Americans are most acquainted with the majority and the plurality voting methods. In the plurality method, the candidate with the most votes on the first ballot wins the election. Majority elections require the winner receive more than 50% of the votes. If no candidate receives more than 50% of the votes, the top two candidates confront each other in a runoff election.

OSSD polled other states' public employee retirement systems. Twenty-two responded and all but four stated they use the plurality method for

selecting Board representatives. The remaining four use the majority method with a runoff election.

Majority and plurality methods are similar in that the voters' will is determined by a single selection, i.e., the voter selects a single candidate with a single vote.

Some argue that other methods are more accurate in determining the true will of the electorate, including Instant Runoff Voting (IRV), also known as, Ranked Choice Voting (RCV).

The IRV method asks the voter to indicate his or her first, second, and third choices for the office. If there is no majority winner, then the candidate with the fewest votes is eliminated from the competition and that candidate's votes are awarded to other candidates, based on the voters' second choice. This process is repeated until there is a majority winner.

It has been mathematically demonstrated that the IRV method can result in no winner being selected. It can also be demonstrated that in IRV elections the voters who cast votes for the lowest candidate have the opportunity to vote a second time, while those voting for a more popular candidate vote only once. Thus, these "fringe" voters could decide the winner.

In 2004, the Secretary of State conditionally gave San Francisco permission to use Ranked Choice Voting for its last two elections. The City of San Francisco prefers the term RCV because IRV could lead citizens to believe the results would be known the night of the election. In reality, it took days for the final results to be determined. As of this writing, that approval has not been extended. To the best of our knowledge, only four U.S. municipalities use RCV/IRV. They include: San Francisco, California; Ferndale, Michigan; Burlington, Vermont; and Takoma Park, Maryland.

While CalPERS staff used several research publications in developing this agenda item, one of the most authoritative is a paper published by San Francisco State University's Public Research Institute in May, 2005, entitled "An Assessment of Ranked-Choice Voting in the San Francisco 2004 Election."

The paper's findings indicate a generally positive result, with 61% indicating they prefer RCV with only 13% indicating they prefer majority voting. Key to the positive process, however, was ensuring the voters were aware they were going to be asked to rank their top three choices

and that they understood the process. San Francisco spent almost \$800,000 on voter education, or roughly \$2.00 for each registered voter in San Francisco. It is also important to note that the primary sources of information for the voters were newspapers, 57%, and television, 31%. Neither of which are available to CalPERS. Only 38% of the voters polled indicated they learned about RCV from literature distributed by the San Francisco Department of Elections, which is the principal method CalPERS would use to inform members.

While there are logistical and procedural issues with moving to an IRV method, the main concern exists with the confusion any "ranked" system, including IRV, would bring to the members. Any savings realized by moving to IRV would be lost with the education program required to acquaint members with the new system.

Additionally, there is the concern that the added complexity of ranked voting will further discourage and confuse CalPERS' members and the voter turnout, which is already low, would be further reduced.

RECOMMENDATION (B-7): Although ranked voting systems have had some limited use throughout the world for decades, it is a new concept to Americans. Until their use becomes more common, CalPERS should not move to any ranked voting system.

COST: Moving to IRV/RCV would avoid the \$850,000 cost of a runoff election. This amount would be reduced, however, by the costs of voter education. While it is doubtful that CalPERS would spend \$2.00 per registered voter, as San Francisco did, spending only fifty cents per member would still cost more than \$500,000 for CalPERS' largest election.

8. Should "inactive members" have the same voting rights as "active members?"

Government Code section 20090, subdivision (g) specifies which groups of voters will elect each Board member. Subdivision (g) (1) is the only provision that refers to the general membership of the system; all other Board members are elected by active or retired members as follows:

- (1) Two members elected by the members of this system from membership thereof.
- (2) A member elected by and from the active state members of this system from the state membership thereof.

- (3) A member elected by and from the active local members of this system who are employees of a school district or a county superintendent of schools.
- (4) A member elected by and from the active local members other than those who are employees of a school district or a county superintendent of schools.
- (5) A member elected by and from the retired members of this system.

CalPERS regulations provide for distribution of notices and ballots to active members and to retirees. The regulations do not address “inactive members”.

The term “inactive member” is used internally in CalPERS to refer to members who are not retired and are not currently employed by a CalPERS covered employer, but who have contributions on deposit. The term inactive member is not a defined term in the PERL. For decades, CalPERS has interpreted Government Code section 20090 as not referring to “inactive members”.

The section’s legislative history does not give clear indication of any different legislative intent. In addition, the section’s reference to “active local members ... who are employees...” in subdivisions (3) and (4) strongly suggests an intent not to include “inactive” members (since they are not employees), and there is no suggestion the Legislature used the word “active” in any different sense in subdivision (2) even though it did not refer to “employees.” Finally, though it is not entirely clear, omission of reference to “active” members in subdivision (1) does not necessarily establish intent to change the meaning of the word from the other subdivisions or to refer to other than “active” and “retired” members.

On June 30, 2005, there were 227,787 inactive members. The estimated cost to provide election materials to this population would be \$242,000 for each election (initial and runoff). One significant issue is determining in which election inactive members would vote, since they are not currently employed by a CalPERS employer or retired and therefore may not fit into any of the categories described in section 20090(g). CalPERS does not maintain regular contact with these inactive members, other than mailing them their Annual Member Statements. Current addresses are not maintained, unless the inactive member submits address updates. Voter disenfranchisement of a significant segment of this inactive member population will result from them not receiving election information or ballots. Since this inactive member population is not actively employed or retired, it is generally not an informed CalPERS population, so they would

be uninformed voters. This population is not mailed the PERSpective newsletter, or any other CalPERS publication.

RECOMMENDATION (B-8): Continue the long standing CalPERS practice of not allowing “inactive members” the same voting rights as “active members”.

COST: To include inactive members in elections, the cost would be an estimated \$484,000 for both the initial and runoff election for each election in which inactive members would be allowed to participate.

9. CalPERS regulation prohibits CalPERS staff “directly involved in conducting a CalPERS election” from using his/her official position to favor one candidate over another. Should the regulation be amended to delete the reference to staff “directly involved in conducting a CalPERS election”?

This issue was raised by a member’s petition to CalPERS requesting CalPERS to consider amending its regulations to broaden the restriction. The issue of deleting the “directly involved” portion of the section to include all CalPERS staff in the restriction was considered when CalPERS was amending its elections regulations in 2000-2001. CalPERS stated at that time, “The proposed restriction may be excessively broad, thus becoming vague in its application to non-election activities.... Also, there is no showing of necessity at this time for making the regulation broader in coverage....” Based on this determination, CalPERS decided at that time not to adopt the proposed changes to the regulation.

No problems have arisen regarding this issue at any time since it was considered in 2000, and the public petition seeking the amendment did not identify any problems that have arisen regarding the issue.

RECOMMENDATION (B-9): In light of the varied conflict of interest requirements that currently exist and the lack of problems with the current regulations, staff does not believe that additional regulation in this area is needed.

COST: None

V. STRATEGIC PLAN:

This item is not a specific product of the Strategic Plan, but is part of the regular and ongoing workload of the Operations Support Services Division.

VI. RESULTS/COSTS:

Results are variable depending on which Recommendations the Board chooses to implement. The implementation of some of these activities, e.g., a new candidate statement for a runoff election and a recount after a non-majority vote winner initial election, are election schedule driven. Cost implications of the various Recommendations are designated above.

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Attachments